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In the Supreme Court of the United States

OCTOBER TERM, 1979

KERRY P. DAY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether the court of appeals correctly sustained various military regulations establishing the adequacy of military housing for the purpose of determining eligibility to receive monetary housing allowances.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-17 to A-38) is reported at 611 F. 2d 1122. The opinion of the district court (Pet. App. A-1 to A-16) is reported at 441 F. Supp. 165.

JURISDICTION

The judgment of the court of appeals was entered on February 15, 1980, and a petition for rehearing was denied on April 17, 1980 (Pet. App. A-39). The petition for a writ of certiorari was filed on July 16, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. 37 U.S.C. 403 provides that, under certain circumstances, eligible members of the uniformed services are entitled to receive a "Basic Allowance for Quarters" ("BAQ"):

> (a) Except as otherwise provided by law, a member of a uniformed service who is entitled to basic pay is entitled to a basic allowance for quarters * * *.
>
> (b) Except as otherwise provided by law, a member of a uniformed service who is assigned to quarters of the United States or a housing facility under the jurisdiction of a uniformed service, appropriate to his grade, rank, or rating and adequate for himself, and his dependents, if with dependents, is not entitled to a basic allowance for quarters.
>
> * * * * *
>
> (j) The President may prescribe regulations for the administration of this section, including definitions of the words "field duty" and "sea duty."

Pursuant to Section 4J3(j), the President and, pursuant to authority delegated by the President, the Secretaries of Defense and the Air Force promulgated regulations implementing 37 U.S.C. 403 and establishing the adequacy of bachelor quarters for the purpose of determining entitlement to BAQ.[1] These regulations provide that the standards of adequacy established therein may be reduced by major overseas commands for areas involved in combat or contingency operations or in support of those operations. Under this explicit delegation of authority, the Headquarters for the Pacific Air Force ("PACAF"), a major overseas command, issued a series of supplemental regulations to AFM 30-7 and AFR 30-7 stating that the minimum standards of adequacy applicable in Thailand and Southeast Asia would be "110 square feet for officer personnel excluding space for bathing and toilet facilities" (App. A-88, A-94, A-101, A-104). On September 16, 1975, PACAF issued a further supplement to AFM 30-7 and AFR 30-7 stating that "[t]he minimum adequacy standards for bachelor quarters in Thailand and Korea are waived" (App. A-142).

In addition to the regulations establishing the standards by which "appropriate" and "adequate" housing for purposes of housing allowance eligibility are to be judged, the Air Force maintains real property accountability records ("AF Form 1430") as to each structure on an Air Force installation. Pursuant to AFM 93-1 (App. A-52),

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[1]See Exec. Order No. 11157, 29 Fed. Reg. 7973 (1964) (App. A-18); DOD Instruction No. 4165.47 (App. A-26, A-31, A-41); AFM 30-7 (App. A-57); AFR 30-7 (App. A-111). ("App." refers to the oversized appendix lodged by petitioners with the Clerk of the Court.) AFM 30-7 was the operative Air Force regulation pertaining to BAQ in effect from January 1, 1970, through May 12, 1975 (App. A-57). At that time AFR 30-7 replaced AFM 30-7 as the effective regulation (App. A-111).

the Air Force records information relating to the physical structure and condition of the building and other miscellaneous accounting data.

2. The named petitioners in this action represent a class of unmarried Air Force officers who (1) were permanently stationed in Thailand during some portion of the period from January 27, 1970, through and including January 26, 1976, (2) were assigned to Air Force housing and (3) had no dependents. Petitioners filed suit in the United States District Court for the Northern District of Texas, alleging that, during the period they were permanently stationed in Thailand, they were assigned to quarters not "appropriate to [their] grade, rank, or rating and adequate for [themselves]" and that they therefore were entitled to BAQ for that period pursuant to 37 U.S.C. 403. In their motion for summary judgment, petitioners asserted that adequacy for purposes of BAQ must be determined by reference to the minimum adequacy standards defined in AFM 30-7 and AFR 30-7, as well as the condition code placed on AF Form 1430.[2] Although not questioning the delegation of authority to PACAF to issue supplementary regulations for Southeast Asia or the reasonableness of the Southeast Asia standards themselves, petitioners argued that the setting of different minimum standards of adequacy for different geographic areas constituted an improper exercise of authority under 37 U.S.C. 403.

The government also moved for summary judgment, contending that under Section 403 of Exec. Order No. 11157 (App. A-24) all petitioners provided with rent-free

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[2]Petitioners alleged that 98.1% of the housing facilities for bachelor officers in Thailand were classified as substandard in these real estate records.

quarters were ineligible to receive BAQ. In the alternative, the government argued that all petitioners assigned to quarters meeting the standards of adequacy set by PACAF for Thailand were assigned to "adequate" and "appropriate" housing and were therefore ineligible to receive BAQ under 37 U.S.C. 403(b).

The district court held that Section 403 of Exec. Order No. 11157, by providing that *any* quarters offered by the government without charge are by definition adequate under 37 U.S.C. 403, was invalid as inconsistent with the statute (Pet. App. A-4). Nevertheless, the court granted the government's motion for summary judgment as to the subclass of petitioners who had received quarters satisfying the PACAF standards of adequacy for Southeast Asia established in the supplemental regulations. It reserved for further hearing the question of which petitioners were in the subclass.

On appeal, the court of appeals affirmed the decision of the district court in part, holding that all petitioners who had been assigned to quarters that satisfied the minimum standards of adequacy established by PACAF for Thailand prior to September 16, 1975, were precluded from recovering BAQ. As to the period after September 16, 1975, when PACAF amended its supplemental regulations to waive all minimum standards of adequacy, the court of appeals held that the regulation was improper and unenforceable. The court of appeals therefore remanded the case to the district court for determination of whether petitioners' quarters had been adequate during that period.[3]

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[3]The court of appeals also upheld the district court's determination that Section 403 of Exec. Order No. 11157 was invalid (Pet. App. A-21 to A-23).

In their petition for rehearing, petitioners for the first time in this litigation asserted that the President had not delegated to the Secretary of Defense, the Secretary of the Air Force, or PACAF the authority to set minimum standards of adequate housing for purposes of BAQ. Also for the first time, petitioners raised the issue of whether PACAF applied proper factors in establishing the standards of adequacy, assuming that the President had properly delegated his authority. The court of appeals denied the petition for rehearing without comment.

ARGUMENT

1. Petitioners' primary argument (Pet. 22-28) is that neither the Secretary of Defense nor the Secretary of the Air Force has authority to establish minimum standards of "appropriate" and "adequate" housing for the purpose of determining eligibility for basic housing allowances under 37 U.S.C. 403(a) and (b). This argument was first asserted by petitioners in their petition for rehearing and therefore is not addressed in the opinion of the court of appeals. It is, in any event, meritless.

Executive Order No. 11157 is in pertinent part identical to its predecessor, which was promulgated in 1951.[4] Section 403 of Exec. Order No. 11157 provides that

> Any quarters or housing facilities under the jurisdiction of any of the uniformed services in fact occupied without payment of rental charges (a) by a

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[4]Exec. Order No. 10204, 16 Fed. Reg. 417 (1951): "Any quarters or housing facilities under the jurisdiction of any of the uniformed services in fact occupied without payment of rental charges (a) by a member and his dependents, or (b) at his permanent station by a member without dependents, or (c) by the dependents of a member on field duty or on sea duty or on duty at a station where adequate quarters are not available for his dependents, shall be deemed to have been assigned to such member as appropriate and adequate quarters, and no basic allowance for quarters shall accrue to such member under such circumstances * * *."

> member and his dependents, or (b) at his permanent station by a member without dependents, or (c) by the dependents of a member on field duty or on sea or on duty at a station where adequate quarters are not available for his dependents, shall be deemed to have been assigned to such member as appropriate and adequate quarters, and no basic allowance for quarters shall accrue to such member under such circumstances * * *.

This provision is ambiguous. It may have been intended to prevent a member of the uniformed services from occupying military housing and then claiming a housing allowance because he was not formally "assigned" quarters.[5] Alternatively, the provision may have been intended to prevent a member of the service from challenging the "appropriateness" or "adequacy" of quarters that he in fact voluntarily occupied without charge.[6] The lower courts in this case concluded that the latter construction would be inconsistent with the language of 37 U.S.C. 403(b).

Although Section 407 of Exec. Order No. 11157 explicitly authorizes the Secretaries of the various military departments to prescribe "such supplementary regulations not inconsistent [with Exec. Order No. 11157] as they may deem necessary or desirable for carrying out [Exec. Order No. 11157]," petitioners contend that the Secretaries have no authority to prescribe regulations establishing minimum standards of adequacy and appropriateness. According to petitioners, any such regulations would be "inconsistent" with Exec. Order No.

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[5]See *True* v. *United States*, 69 F. Supp. 128, 129 (Ct. Cl. 1947).

[6]See *Driver* v. *United States*, 106 Ct. Cl. 821, 823, 825 (1946); 40 Comp. Gen. 169, 171 (1960).

11157 and therefore unauthorized. That argument ignores at least 29 years of history. As noted above, Exec. Order No. 11157 is, in pertinent part, identical to Exec. Order No. 10204. The Secretaries of the various military departments have set minimum standards of adequacy for military housing since at least 1951. No President has construed either Exec. Order No. 10204 or 11157 as precluding such standards.

Furthermore, petitioners' argument ignores the context of the pertinent provisions and the language of Section 403 of the executive order itself. Sections 404, 405, and 406 of Exec. Order No. 11157 clearly contemplate that the Secretaries of the various military departments will prescribe minimum standards of adequacy for military housing for the purpose of determining eligibility for basic housing allowances. For example, Section 404 provides (App. A-24) (emphasis added):

> When *adequate quarters* for his dependents *are not available for assignment* at his permanent station to a member with dependents, he may occupy quarters of the United States designated for members without dependents without affecting his right to receive payment of basic allowances for quarters, if permitted or required to occupy quarters at such station. Under such circumstances, a member may not occupy quarters of the United States which *exceed the minimum standards for members of his grade without dependents, as prescribed by the Secretary concerned*, unless the only quarters available (a) exceed the minimum standard, and (b) are made available for joint occupancy with other members.

If, as petitioners assert, the only permissible standard for "adequacy" is occupancy in fact under Section 403 of the

executive order, then no Secretary could establish the "minimum standards for members of his grade without dependents" contemplated by Section 404 of the order.

Nor does the language of Section 403 of the executive order support petitioners' assertion that no standards of adequacy are permissible under that section. If occupancy in fact is the only standard for judging adequacy, the circumstance described in Section 403(c) of the executive order, *i.e.*, the absence of "adequate quarters" for a member's dependents, could never occur. Furthermore, as noted above, Section 403 of the executive order can reasonably be read to make occupancy in fact the standard for determining whether quarters have been "assigned," leaving questions of the appropriateness and adequacy of the quarters "deemed to have been assigned" for flexible definition in light of the circumstances. Indeed, until they sought rehearing in the court of appeals, petitioners seem to have urged this position.[7] The court of appeals thus correctly sustained the authority of the Secretaries to prescribe minimum standards of adequacy.[8]

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[7]In their brief to the court of appeals, petitioners stated (Br. 20): "Plaintiffs admit that the Secretary of the Air Force had the authority to prescribe standards defining 'appropriate to his grade, rank, [or] rating and adequate for himself' within the meaning of 37 U.S.C. § 403(b). The Secretary of the Air Force exercised that authority by enacting 'condition codes' * * * classifying the adequacy of buildings for housing of officers and by enacting 'minimum adequacy standards' set forth in AFM 30-7 and AFR 30-7 * * *. Plaintiffs submit that these standards are applicable and controlling."

[8]The court of appeals also properly rejected (Pet. App. A-15) petitioners' contention that "appropriateness" or "adequacy" cannot be determined in light of prevailing environmental, social, economic, and military conditions. See also *Lischak* v. *United States*, 202 Ct. Cl. 598, 604 (1973). Petitioners' belated attempt to manufacture a question of fact as to the reasonableness of the governing standards

2. Petitioners contend (Pet. 28, 32) that the court of appeals erred when it held that DOD Instruction No. 4165.47, AFM 30-7 and AFR 30-7, as well as the PACAF Supplements to the Air Force regulations were intended to constitute the standards of adequacy of housing for BAQ purposes. This contention is without merit. The two Department of Defense instructions numbered 4165.47, which were in effect from May 12, 1972, through the filing of the petition, give as their source of authority the BAQ statute (App. A-31, A-41). Similarly, DOD Instruction No. 4165.47, in effect prior to May 12, 1972, cites its authority as Exec. Order No. 11157 (App. A-26). The applicable Air Force Regulations, AFM 30-7 and AFR 30-7 (App. A-57, A-111), as well as the PACAF Supplements (App. A-88, A-94, A-101, A-142), also trace their authority to DOD Instruction 4165.47 and Exec. Order No. 11157. It is apparent, therefore, that these regulations were adopted pursuant to 37 U.S.C. 403 and Exec. Order No. 11157 and were intended to prescribe minimum standards of adequacy.

In any event, the contention provides no basis for challenging the decision of the court of appeals in this case. The Department of Defense and the Air Force regulations, issued pursuant to valid authority,[9] express the judgment of those departments as to the minimum standards of satisfactory housing for military personnel, specifically authorizing the establishment of lower

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(Pet. 33-34) is frivolous. A party's assertion in a brief or petition for rehearing is not sufficient to create an issue of fact, precluding summary judgment under Fed. R. Civ. P. 56.

[9]Without regard to 37 U.S.C. 403(b) and Exec. Order No. 11157, the Secretaries of Defense and the Air Force have general rulemaking authority. See 5 U.S.C. 301; 10 U.S.C. 131 and 8012(e).

standards for major overseas commands in light of the circumstances considered relevant by commanding officers. The PACAF supplemental regulations established standards for judging the adequacy of military housing in Thailand. The court of appeals affirmed the judgment of the district court dismissing the claims of all petitioners who were assigned to quarters that satisfied the standards prescribed in the PACAF supplemental regulations. Since petitioners never challenged the adequacy or reasonableness of the standards in light of the circumstances existing in Thailand at the time, there was no reason for the court of appeals to consider those issues. As noted above, petitioners' belated attempt to raise these issues in their petition for rehearing and in their petition for certiorari is insufficient to create an issue of fact precluding summary judgment.

3. The court of appeals correctly found (Pet. App. A-28 to A-33) that the real property records maintained by the Air Force (AF Form 1430) do not define what military housing is "appropriate to [the] grade, rank, or rating and adequate" for members of the uniformed services, within the meaning of 37 U.S.C. 403(b). There is simply no basis for petitioners' assertion (Pet. 18-19) to the contrary, except perhaps that both the statute and AF Form 1430 refer to "adequacy." Prior to 1967, "adequacy" for purpose of 37 U.S.C. 403(b) was expressly tied to the real property records maintained by the Air Force.[10] The regulations in effect during the time relevant to this litigation do not even refer to AF Form 1430. Thus, as the

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[10]For that reason, *Lischak* v. *United States*, 202 Ct. Cl. 598 (1973), in which the Court of Claims relied on the classification in AF Form 1430 to determine the "adequacy" of military housing under 37 U.S.C. 403(b), is consistent with the court of appeals' decision in this case.

court of appeals observed (Pet. App. A-32 to A-33), "whatever significance the [AF Form 1430] condition code may have in terms of engineering considerations or construction planning, it was not intended to serve as the criterion for distinguishing between adequate and inadequate housing for BAQ purposes."[11]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[11]Petitioners' assertion (Pet. 9, 13) that the court of appeals' decision conflicts with the decisions of this Court in *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959); *Service* v. *Dulles*, 354 U.S. 363 (1957); and *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954), is insubstantial because the pertinent regulations were applied in this case. Similarly, petitioners' assertion (Pet. 9-11) that the court of appeals' decision conflicts with the "principles" of *Bell* v. *United States*, 366 U.S. 393 (1961); *United States* v. *Andrews*, 240 U.S. 90 (1916); and *United States* v. *Symonds*, 120 U.S. 46 (1887), is without merit. Petitioners have no statutory "entitlement" to housing allowances if they are provided with "appropriate" and "adequate" military housing without charge. The court of appeals correctly sustained the regulations of the Secretaries, which establish minimum standards of "adequacy" for purposes of 37 U.S.C. 403(b).

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